telecommunications costs to the Minnesota government by exchanging ROWs access for transmission capacity; and (4) increase competition by adding another fiber optic network within the state.[65] Items (1) and (2) suggest that DOT intends to regulate the terms and conditions of telecommunications service, at least as between the State and a particular service provider. Items (3) and (4) indicate that a purpose of opening up this previously unavailable ROW is to promote the availability and competitiveness of telecommunications service. Thus, while providing for exclusive ROW access may generally be an ROW management function, in this context any such function appears ancillary to the Agreement and has been cited by Minnesota in a *post hoc* effort to rationalize the Agreement.[66]

Further, as discussed above, the exclusive access provisions of the Agreement treat similarly situated carriers differently and are therefore not "competitively neutral." The fact that the Developer must permit competing carriers to collocate and must provide competitors with resale capacity does not undermine this conclusion because access to public ROWs will be determined by a competing carrier rather than the State. Nor do the facts regarding existing market conditions refute this conclusion. As discussed above, the Developer's obligations to competing carriers under the Agreement do not provide competing carriers with meaningful access to the freeway ROW or the markets that may be served from the ROWs. Similarly, Minnesota's evidence regarding the existing market conditions for intercity fiber transport capacity does not provide any assurance regarding the market conditions throughout the life of

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65 Petition at 9.

66 It bears repeating that the significant length of the exclusivity term (10 years plus an option to extend for 10 years) also runs counter to typical ROW management arrangements.

the Agreement. Consequently, the Agreement is not "competitively neutral," and therefore violates Section 253(c).

Moreover, the Agreement does not satisfy the "fair and reasonable compensation" requirement of Section 253(c). The compensation that Minnesota will receive (*i.e.*, free telecommunications infrastructure and service) is not related to the costs it will incur regarding managing the freeway ROWs to permit the Developer's exclusive access. While there is no precedent on point, the legislative history suggests that fair and reasonable compensation should be related to the costs imposed upon state and local governments for the use of public ROWs.[67]

Further, and importantly, Section 253(c) expressly provides for the right of the state or locality to receive fair and reasonable compensation for the use of public ROWs. Under the Agreement, however, the majority of any compensation expected from the use of the freeway ROWs will go to the developer, and not to the State. The Agreement clearly contemplates that payments from third party carriers for the use of the freeway ROW for the collocation of facilities or for wholesale transport capacity will be made to the Developer, not Minnesota. Moreover, under the Agreement, it is the Developer, not the state, that will set the level of compensation. In other words, Minnesota has effectively abdicated its rights and responsibilities regarding fair and reasonable compensation to the Developer. In light of the above,

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67 In comments opposing the preemption provision of Section 253(d), Senator Feinstein asserted that Section 253(d) would exempt "communications providers from paying the full costs they impose on State and local governments for the use of public right-of-way." 141 Cong. Rec. S8170 (daily ed. June 12, 1995). There is no indication in case law or legislative history that "fair and reasonable" compensation was intended to refer to anything other than compensation for actual costs incurred as a result of the use of a public ROW. *See accord OVS Decisions*, *OVS Second Report and Order*, 11 FCC Rcd. 18223, 18335 ¶ 221 (1996), *OVS Third Report and Order*, 11 FCC Rcd. 20227, 20310 ¶ 195 (1996).

U S WEST submits that the Agreement fails to meet the basic standards set forth in Section 253(c).

Furthermore, this failure to meet the Section 253(c) standards requires the Commission to dismiss the Petition *regardless* of whether the Agreement constitutes an entry barrier under Section 253(a). The recent decision in *TCG Detroit v. City of Dearborn*, 977 F. Supp. 836, 841 (E.D. Mich. 1997), holds that Section 253(c) constitutes a limitation on state and local action separate and apart from Section 253(a).[68] As summarized by the Court:

> [I]t is simply illogical to presume that although a telecommunications provider would have a cause of action under Section 253(a) if it was being denied entry into a market by a local statute or ordinance; yet, that same telecommunications provider would be left without recourse if the local government authority — while not denying entry into a market — discriminated against it in the application of fees, costs, permits or agreements. Such an obviously inconsistent result could not have been the intent of Congress in enacting the Telecommunications Act of 1996.[69]

In other words, ROW management practices may be overturned as discriminatory and not competitively neutral *in the absence* of any finding with regard to entry barriers under Section 253(a).

U S WEST recognizes that language and legislative history of Section 253(d) suggest that the Commission does not have the authority to preempt the Agreement independent of a finding of an unlawful entry barrier under Section 253(a). Section 253(c) challenges to state and local action should be made in court. However, Minnesota's Petition places the issue of

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[68] U S WEST acknowledges that the Court in *GTS Tucson Lightwave, Inc. v. City of Tucson*, 950 F. Supp. 968, 971 (D. Ariz. 1996), *appeal dismissed and remanded on mootness grounds*, 1998 U.S. App. LEXIS 1498 (9th Cir., Feb. 2, 1998), reached a different conclusion.

[69] *City of Dearborn*, 977 F. Supp. at 840-41.

whether the Agreement satisfies the "competitively neutral and nondiscriminatory" standards of Section 253(c) squarely before the Commission. U S WEST therefore urges the Commission to find that the Agreement is not competitively neutral and nondiscriminatory and deny the Minnesota Petition, without regard to whether the Agreement constitutes an entry barrier under Section 253(a).

VI. THE COMMISSION SHOULD PREEMPT THE AGREEMENT

U S WEST submits that the Commission should preempt the Agreement. While no party has filed a preemption petition, by petitioning the Commission for a declaration that the Agreement complies with Section 253 of the Act, Minnesota has placed the validity of the Agreement under Section 253 at issue. Moreover, as shown above, the Commission cannot endorse the Agreement as complying with Section 253(a), (b), *or* (c).

Through the Agreement, Minnesota has granted a single carrier exclusive access to freeway ROWs for more than 20 years in exchange for free telecommunications services. In other words, Minnesota is monopolizing public ROWs for its own benefit and in the process, denying competing carriers access to the shortest, most direct route for the construction of facilities to serve communities located along those freeways. In U S WEST's view, such conduct is clearly a barrier to entry in violation of Section 253(a).

Moreover, as demonstrated above, the Agreement goes well beyond the legitimate exercise of the State's undisputed authority to protect the public safety and manage public ROWs. The Agreement cannot be justified under Section 253(b) because it does not satisfy the "competitively neutral" and "necessary" standards of that provision. Simply put, the Agreement does not extend the same opportunities to all carriers and in fact grants to one carrier the

discretion to exclude competing carriers from use of the freeway ROWs. Minnesota also failed to show that the exclusive ROW access provisions are "necessary" to serve Section 253 objectives and constitute the least restrictive means of serving those objectives.

Finally, the Agreement cannot be justified as an exercise of ROW management authority permitted under Section 253(c). Indeed, the Agreement can hardly be characterized as ROW management at all.[70] While providing for exclusive ROW access may generally be an ROW management function, in this context any such function appears ancillary to the Agreement and has been cited by Minnesota in a *post hoc* effort to rationalize the Agreement. Even a casual review of the Agreement reveals that it is in effect a contract for the provision of telecommunications infrastructure and services, in which exclusive access to freeway ROWs is provided as consideration. In effect, to obtain some free services, the State has effectively transferred control over access to the public ROW to one competing carrier.

As a consequence, U S WEST submits that the Commission cannot find that the Agreement complies with Section 253 and, therefore, should preempt the Agreement pursuant to Section 253(d). Anything other than preemption would send a signal to other states and municipalities that exclusive arrangements such as the Agreement are lawful under Section 253. A signal of this nature will likely breed additional litigation either before this Commission or in court dealing with substantially the same legal issues. This result would be needlessly detrimen-

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[70] In this regard, U S WEST notes that on February 9, 1998, the Minnesota House of Representatives filed comments in this proceeding expressing its concern that the Agreement represents an improper usurpation of legislative policy jurisdiction. House of Representative Comments at 1. In this regard, the Minnesota House noted that: the term of the Agreement far exceeds the typical term of government contracts; the compensation to be received by Minnesota under the Agreement may violate state statutes regarding the rental of real estate; and the legislature has not authorized Minnesota to take title to the network upon the termination of the Agreement. *Id.*

tal to the interests of the states, telecommunications carriers, and ultimately the consumers. Consequently, U S WEST urges the Commission to preempt the Agreement.

CONCLUSION

For the foregoing reasons, U S WEST submits that the Commission cannot endorse the Agreement. Given the extraordinary duration for which Minnesota has granted exclusive access to the freeway ROWs, the Commission cannot determine that the exclusive ROW access arrangement will not constitute an entry barrier, either now or in the future. Further, the Agreement effectively transfers control over access to the freeway ROWs to a single competing carrier, and therefore is not a competitively neutral exercise of ROW management

authority. Thus, U S WEST urges the Commission to deny Minnesota's Petition and preempt the Agreement.

Respectfully submitted,

U S WEST, Inc.

By: James T. Hannon

James T. Hannon

U S WEST, Inc.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2860

Its Attorney

Of Counsel,
Daniel L. Poole
U S WEST, Inc.

Luisa L. Lancetti
Jeffrey S. Bork
Wilkinson, Barker, Knauer & Quinn, LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 783-4141

March 9, 1998

CERTIFICATE OF SERVICE

I, Shelia L. Smith, hereby certify that on this 9th day of March 1998, copies of the foregoing Comments of U S WEST, Inc. were served on the following by first-class, postage-prepaid mail:

*The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

*The Honorable Harold W. Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

*The Honorable Michael K. Powell
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

*The Honorable Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

*The Honorable Gloria Tristani
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

*Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

*International Transcription Services
1231 20th Street, N.W.
Washington, D.C. 20036

Steve Wilensky
Assistant Attorney General
1200 NCL Tower
St. Paul, MN 55101

Donald J. Mueting
Assistant Attorney General
525 Park Street, Suite 200
St. Paul, MN 55103

Shelia L. Smith
Shelia L. Smith

*By Hand